IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RAMON YBARRA, Plaintiff, v. J. GREGORY SWANSON, Defendant/Third Party Plaintiff, v. DIANE F. BARGER, Third Party Defendant.	))))))))))	Case No. 02-1368-WEB

MEMORANDUM AND ORDER

This legal malpractice action is now before the Court on the motion of Plaintiff Ramon Ybarra (Ybarra) for summary judgment. Defendant/Third Party Plaintiff J. Gregory Swanson (Swanson) has also attempted to implead Third Party Defendant Diane F. Barger (Barger), and Ybarra asks the Court to strike the third-party complaint.

I. FACTS

The Court finds that the following facts are uncontroverted. Ybarra was injured in an automobile accident on January 7, 1998, in Seward County, Kansas. Ybarra hired Swanson, who filed a complaint on Ybarra's behalf in Seward County district court on November 1, 1999. Along with the complaint Swanson filed a "Declaration of No Service of Summons" (Declaration), which stated:

> I, J. Gregory Swanson, am the attorney of record for the Plaintiff. I do not want a Summons to be issued in this matter at this time. I will provide the Clerk with a Summons when I determine it should be issued, and notify the Clerk in writing when to issue the summons.

> I am aware that K.S.A. 60-301 requires the Clerk to issue a Summons for service on each Defendant upon the filing of a Petition. I hereby assume the responsibility for determining when Summons is to be issued.

Plaintiff's Exhibit F.

The statute of limitations in Kansas for injuries to the rights of another, not arising on contract, is two years. See K.S.A. 60-513(4). Swanson did not notify the clerk of the Seward County Court to issue a summons before January 7, 2000. On May 19, 2000, the state district court served notice on Swanson of its intent to dismiss the Seward County lawsuit for lack of prosecution.

Ybarra met with Barger on May 26, 2000, and retained her as counsel. Barger entered her appearance and obtained permission to enlarge the time for service. Two defendants in the Seward County lawsuit, Roger E. Schultz and Diamond F. Corporation (Schultz and Diamond F.), successfully raised a statute of limitations defense and were dismissed with prejudice on or about April 28, 2001.

On May 31, 2002, the state district court held an evidentiary hearing and made findings regarding the comparative fault of the parties. The record does not show who received notice of the hearing. Ybarra appeared with Barger and Randall E. Fisher as his counsel, and an intervening insurance company appeared through its counsel. There were no appearances for Schultz and Diamond F. The state district court found that Ybarra was 0% at fault, that Schultz and Diamond F. were 25% at fault, and that another defendant was 75% at fault. Based on this finding of comparative fault, and given the total damages in the case, the state district court found that Schultz and Diamond F. would have been liable for a total of $114,000.00. Because Schultz and Diamond F. had been dismissed, however, the state district court did

not enter judgment against them. [1]

Ybarra then filed the instant suit. Ybarra recited the findings of the state district court and claimed he could not collect the "$114,000.00 owed to him by [Schultz and Diamond F.] . . . because . . . Swanson failed to have those defendants properly served . . . ." Complaint, at ¶ 22. Swanson answered on November 4, 2002, stating that he was without knowledge of the state district court's findings and generally denying the allegations of damages.

On February 10, 2003, Swanson filed a third-party petition against Barger. Swanson alleged that "[a]ny damages or loss of money that . . . Ybarra claims to have lost . . . were as a result of the negligence of . . . Ybarra and the negligence of . . . Barger." Third Party Petition, at ¶ 3. Swanson further alleged that "[a]ny judgment against [Swanson] or any assessment of negligence assessed to [Swanson] should be assessed to or granted against . . . Barger." Id, at ¶ 5.

Ybarra's requests summary "judgment against defendant on liability . . . ," but there is no request for judgment on damages. Plaintiff's Motion for Summary Judgment, at 2.

II. SUMMARY JUDGMENT

A. Standard

Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue as to any material fact, and that the moving

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[1]Among the state district court's findings were: "the Court previously dismissed defendants [Schultz and Diamond F.] because they were not timely served with process as required by law and plaintiff's claims against them are barred by the applicable statute of limitations"; "the parties would normally be liable for damages as follows: . . . [Schultz and Diamond F.], $114,000.00 . . . ."; "because of the Court's previous ruling regarding defendants [Schultz and Diamond F.], plaintiff cannot take judgment against them." Plaintiff's Exhibit V, ¶¶ 5, 8-9.

party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The Court must examine the factual record and draw reasonable inferences in the light most favorable to the nonmoving party. *See Simms v. Okla. ex rel. Dept. of Mental Health*, 165 F.3d 1321, 1326 (10th Cir.1999). The question of legal malpractice may be removed from the trier of fact and decided as a matter of law only in the rare case where the material facts are both uncontroverted and susceptible of just one interpretation. *See Bremenkamp v. Beverly Enterprises – Kansas, Inc.*, 762 F.Supp. 884, 890 (D.Kan. 1991); *Bergstrom v. Noah*, 974 P.2d 531, 553-54 (Kan. 1999).

B. Analysis

Ybarra seeks summary judgment on liability alone, but the Court cannot bifurcate the action into liability and damage phases. The Court's task is to apply Kansas substantive law as it would be applied in a Kansas court. *See Perlmutter v. U.S. Gypsum Co.*, 54 F.3d 659, 662 (10th Cir.1995). Kansas courts require a plaintiff in a legal malpractice claim to show, "(1) the duty of the attorney to exercise ordinary skill and knowledge, (2) a breach of that duty, (3) a causal connection between the breach of duty and the resulting injury, and (4) *actual loss or damage*." *Bergstrom*, 974 P.2d at 553 (emphasis supplied). As the 10th Circuit has stated, "in order for a client to have a cause of action against the attorney that client must have suffered money damages from the act of the attorney." *Frank v. Bloom*, 634 F.2d 1245, 1257 (10th Cir.1980) (considering alleged legal malpractice in a Kansas state proceeding).

Swanson relies on the findings of the state district court to show money damages. Summary judgment obviously cannot be based on an advisory opinion from a collateral proceeding regarding parties which were dismissed with prejudice over a year before the hearing and did not appear. *See Robinson v. Volkwagenwerk AG*, 56 F.3d 1268, 1272-73 (10th Cir.1995)(relitigation of a factual issue is precluded

if it was necessary to a prior judgment and the party against whom it is now asserted had a full and fair opportunity to litigate the issue); *Gigot v. Cities Service Oil Co.*, 737 P.2d 18, 23 (Kan. 1987) (same, but also requiring mutuality of parties). While this Court will give full faith and credit to decisions of the state district court, 28 U.S.C. § 1738, in neither Kansas nor federal court would such a finding properly establish actual loss or damage.

In addition, Ybarra has not shown that the material facts are uncontroverted and susceptible of only one interpretation. Ybarra alleges that he trusted Swanson and dismissed him only after the service deadline had passed, but Swanson submitted an affidavit alleging that Ybarra terminated the attorney-client relationship before the deadline passed, telling him that another attorney was working on the case. Ybarra complains that Swanson's affidavit is conclusory and lacks documentary proof, but whatever its limitations Swanson does not contradict prior sworn statements, and he alleges particular facts of which he would have personal knowledge. For purposes of summary judgment, the date Swanson was fired, and the instructions he received from Ybarra, remain controverted.

Ybarra also argues that the affidavit is immaterial because Swanson's obligations continued as long as he was counsel of record. The Kansas Supreme Court has offered this observation on judicially imposed standards of care in legal malpractice cases:

> Because district judges and appellate court judges are, themselves, attorneys, they naturally have opinions as to whether or not certain conduct constitutes legal malpractice. It is quite east to slip into the trap of deciding such questions 'as a matter of law.' Not having a like expertise in other professions such as medicine or architecture, the issues of professional negligence there are routinely submitted to juries. Nevertheless, claims of legal malpractice, like other forms of malpractice, are normally to be determined by the trier of fact rather than by summary judgment.

Bergstrom, 974 P.2d at 553-54 (quoting *Hunt v. Dresie*, 740 P.2d 1046, 1054 (Kan. 1987).

Under Kansas law, "[e]xpert testimony is generally required and may be used to prove the standard of care by which the professional actions of the attorney are measured and whether the attorney deviated from the appropriate standard." *Bowman v. Doherty*, 686 P.2d 112, Syl. ¶ 7 (Kan. 1984).[2] Ybarra submits an affidavit from Barger, who offers her conclusion that Swanson's lack of diligence led to Ybarra's claims being barred, but there is no testimony regarding the duties Swanson bore as counsel of record or how those duties intersected with any instructions from Ybarra. Barger's affidavit is not sufficient to establish the standard of care Ybarra urges upon this Court.

There is a "common knowledge exception," when "the breach of duty on the part of the attorney . . . is so clear and obvious . . . " that the trier of fact may find legal malpractice "from its common knowledge." *Id*., Syl. ¶ 8. The exception does not apply here because an attorney's duty as counsel of record, especially after being fired, is not a matter of common knowledge. Since the alleged breach of duty is not so clear and obvious as to dispense with expert testimony, it remains an issue for the trier of fact.

III. THIRD-PARTY COMPLAINT

Third-party practice is governed by Fed.R.Civ.P. 14. A third-party plaintiff may proceed against a person not a party without leave of the Court if the third-party complaint is filed no later than 10 days after service of the original answer. Rule 14(a). "Otherwise, the third-party plaintiff must obtain leave on motion upon notice to all parties to the action." *Id.* Swanson filed his third-party complaint over three

[2]Federal courts rely on state law to determine whether expert testimony is necessary to establish the standard of care in legal malpractice actions. *See Brown v. Slenker*, 220 F.3d 411, 422 (5th Cir.2000); *American Intern. Adjustment Co. v. Galvin*, 86 F.3d 1455, 1461 (7th Cir.1996).

months after answering without seeking or obtaining leave to proceed.

Impleader is only available against a "person . . . who is or may be liable to *the third-party plaintiff* . . . ." *Id.* (emphasis supplied). The comments of one authority are fitting here:

> Despite the clear language of the impleader rule on this point, some defendants continue to attempt to implead a third party on the basis of the third-party defendant's direct liability to the *plaintiff*. The courts properly reject such attempts and limit impleader to those third parties who are derivatively liable to the defendant.

3 Moore's Federal Practice, § 14.04[1] (3rd ed. 2003) (emphasis in original).

Even a liberal reading of Swanson's third-party complaint shows that he is attempting to implead Barger because she is allegedly liable to Ybarra, not because she is derivatively liable to him. Swanson alleges no factual basis for contribution, indemnity, or other form of derivative liability. The Court finds that, in the exercise of its discretion, Swanson's third-party complaint should be struck. *See Farmers and Merchants Mutual Fire Ins. Co. v. Pulliam*, 481 F.2d 670, 673 (10th Cir.1973).

IT IS THEREFORE ORDERED that Plaintiff Ybarra's motion for summary judgment (Doc.18) is DENIED;

IT IS FURTHER ORDERED that Defendant/Third-Party Plaintiff Swanson's Third Party Petition (Doc. 10, 12) is STRICKEN.

SO ORDERED THIS __21st_ day of July, 2003.

s/ Wesley E. Brown
Wesley E. Brown, Senior District Judge